In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5105

JOHNNEY BENJAMIN, PETITIONER

v.

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

1. Petitioner, a resident of Michigan, was awarded monthly social security disability benefits, beginning in November 1966, of $107.00 (later statutorily increased to $121.00). But, because he received $58.13 a week in state workmen's compensation and later received a lump sum workmen's compensation settlement of $10,000.00, the Secretary, acting pursuant to Section 224 of the Social Security Act, 42 U.S.C. (Supp. V) 424a, withheld all but $14.00 from those monthly benefits until his workmen's compensation was exhausted.

After exhausting his administrative remedies, petitioner brought this action in the district court, alleging that: (1) the workmen's compensation settlement was a lump sum payment exempt under Section 224

441-851—71

(b) from the reduction provisions of Section 224(a); (2) alternatively, Section 224 deprived him of due process of law as guaranteed by the Fifth Amendment; and (3) the Secretary had failed to apply Section 159 of Public Law 90-248, Social Security Amendments of 1967, which provided for the use of all a claimant's earnings in computing his "average current earnings" for purposes of Section 224.[1] The district court held that: (1) the lump sum settlement was a commutation of petitioner's weekly workmen's compensation benefits and, therefore, that the Section 224 reduction provisions were applicable; (2) Section 224 was constitutional; and (3) petitioner had failed to allege before the hearing examiner or to show at the administrative hearing that his "average current earnings" used in computing the reduction should have been higher (Pet. App. 35-47). Accordingly, the district court granted judgment for the Secretary, and the court of appeals affirmed (Pet. App. 33-35).

2. The constitutional issue raised by petitioner—whether Section 224 arbitrarily discriminates against

[1] Section 224 defines an individual's "average current earnings" as the larger of the average monthly wage used for purposes of computing his benefits under 42 U.S.C. 423 or one-sixtieth of his total wages and self-employment income for the five consecutive years after 1950 when they were the highest. Section 159 of Public Law 90-248, 81 Stat. 869, changed this clause to provide that when an individual's wages and self-employment income for the five consecutive years during which they were the highest are used to compute his "average current earnings," then his actual earnings, rather than those earnings creditable for purposes of social security (which have an upper limit), are to be used.

workmen's compensation beneficiaries (Pet. 18–22)—is presented in three cases now pending before this Court. *Richardson* v. *Belcher*, No. 70–53 (probable jurisdiction noted, 401 U.S. 935); *Bartley* v. *Richardson*, No. 70–12; and *Lofty* v. *Richardson*, No. 70–215. Since the decisions in those cases will be dispositive of petitioner's claim, the Court may wish to defer action on the petition pending those decisions.[2]

There is no merit to petitioner's claim that Section 224 unconstitutionally impairs his workmen's compensation settlement contract (Pet. 23). Section 224 requires the reduction only of social security benefits received by a workmen's compensation beneficiary, and has no effect upon petitioner's workmen's compensation.

3. Petitioner's claim that the lump sum settlement was not a commutation of or a substitute for periodic workmen's compensation benefits, but rather was a "redemption" which is exempt under Section 224(b) from reduction (Pet. 7–9), was considered and rejected by both courts below (Pet. App. 33–34, 37–41). Further review of the issue by this Court is not warranted.[3]

4. Petitioner's final claim—that the Secretary, in computing petitioner's "average current earnings" for

[2] Similarly, decision in the *Belcher* case will be dispositive of petitioner's claim that *Flemming* v. *Nestor*, 363 U.S. 603, no longer constitutes a viable precedent (Pet. 24–26).

[3] Likewise, petitioner's claim that the Secretary, in computing the reduction, should have excluded from the lump sum his *future* medical expenses, which were not specifically determined, was considered and rejected by the court of appeals and does not warrant further review (Pet. App. 34).

purposes of the reduction, failed to use petitioner's figure of $709.00 as his average monthly wage, in violation of Section 159 of Public Law 90–248 (Pet. 27–30)—is without substance. The district court expressly rejected this claim as unfounded, pointing out that petitioner had failed to produce at the administrative level evidence of *yearly* earnings in support of the $709.00 figure and that the Secretary thus had computed his average monthly wage from the income figures for petitioner on file with the Social Security Administration (Pet. App. 43–47). The court left open to petitioner the opportunity to present further evidence to the Secretary on this issue if "plaintiff truly believes his 'actual current earnings' are higher" (Pet. App. 47).

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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